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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-433

DONALD C. CHRISTMAN,

Petitioner,

VS.

EDWARD V. HANRAHAN, ANTHONY CORSENTINO, MARSHALL WEINBERG, WILLIAM MILLER, and JOSEPH DILEONARDI,

Respondents.

(On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit)

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 500 F. 2d 65 (7th Cir. 1974).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254, (1).

QUESTIONS PRESENTED

1. Whether the alleged failure of a prosecutor to comply with a rule of criminal discovery is actionable under the Civil Rights Act, when the evidence allegedly withheld is in fact disclosed to the criminal defendant, properly presented in the criminal trial, and followed by a judgment of acquittal.

2. Whether the prosecutors were acting within the scope of their quasi-judicial function and thus entitled to immunity.

STATUTES INVOLVED

42 U.S.C. Sections 1983 and 1985.

STATEMENT OF THE CASE

On November 6, 1970, Saul Koppel was shot to death in front of his store in Chicago, Illinois, during the course of an attempted robbery. The murder was witnessed by the victim's wife, Mrs. Evelyn Koppel, and a bystander, Mr. William Ragsdale.

On March 3, 1971, the petitioner was arrested and charged with the murder. Later that day, at approximately 6:05 P.M., Mrs. Koppel identified the petitioner at a police line-up as the man who shot her husband. A short time later, at about 7:00 P.M., Mrs. Koppel telephoned the police Homicide Section and told respondent, police Sergeant Joseph Di Leonardi, that she was "not positive" that the man she identified at the line-up was the man who murdered her husband. That phone call was entered as a supplementary report of the Chicago Police Department.

Subsequently, the petitioner was indicted by a Cook County Grand Jury. On March 30, 1971, Mrs. Koppel testified to the grand jury that the man she identified from the police line-up was the same man who shot her husband. The petitioner was also identified as the murderer by Mr. William Ragsdale, the other eye-witness to testify before the grand jury.

On May 13, 1971, petitioner's attorney filed a motion to compel the State to disclose evidence which "might be favorable to the defendant and material to the issue of guilt or punishment or which would in any way weaken or affect any evidence proposed to be introduced against the defendant." Petitioner's attorney was provided with a copy of the supplementary report which made no mention of Mrs. Koppel's telephone call to the police station.

Petitioner alleges that respondent Hanrahan, State's Attorney of Cook County, "through his assistants", respondents Weinberg and Corsentino, turned over an intentionally altered supplemental report. Petitioner next alleges that the respondent police officers altered the supplemental report. Finally, petitioner alleges

that respondents Weinberg and Corsentino, "acting under the direction and control" of respondents Hanrahan, Miller and Di Leonardi, conspired to alter the report.

Petitioner's trial began on April 10, 1972. On the fourth day of the trial, petitioner's defense counsel learned of Mrs. Koppel's March 3, 1971 phone call and brought it to the attention of the Court. Respondents Corsentino and Weinberg learned of the report and phone call only a few days prior thereto, and had immediately requested a copy of the report containing the information relating to Mrs. Koppel's call. Respondent, Corsentino, then offered to have respondent Di Leonardi called as a court's witness to clear up any controversy regarding the phone call, and to permit cross examination and impeachment of Mrs. Koppel's testimony and line-up identification. Following Di Leonardi's testimony, defense counsel's Motion to Suppress the Line-up Identification and Motion for a Mistrial were denied. On the following day the petitioner was acquitted of all charges.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY RULED THAT THE PETITIONER HAD NOT ALLEGED A VIOLATION OF HIS CONSTITUTIONAL RIGHTS ACTIONABLE UNDER THE CIVIL RIGHTS ACT.

Fundamental to the concept of due process is that a defendant in a criminal case be accorded a "fair trial." Basic to the concept of "fair trial" is the duty placed upon the prosecution to disclose evidence favorable to guilt or punishment. *Brady* v. *Maryland,* 373 U.S. 83 (1965). In this case, the petitioner may have alleged a technical violation of the *Brady* rule, however, he has not alleged facts showing that he was denied a "fair trial."

While the petitioner may have been entitled to earlier access to the information he requested pursuant to his discovery motion, the delay in providing that information did not deprive the petitioner of due process of law. In this case, the information was in fact presented at petitioner's criminal trial. Subsequent to the disclosure of the information, respondent Corsentino advised the Court that he had only received a copy of the subject police report that day. Corsentino then called respondent Di Leonardi as a Court's witness to clear up any controversy regarding the phone call, and to permit cross examination of Mrs. Koppel's testimony and line-up identification. Subsequently, the petitioner was acquitted.

The petitioner has not alleged that he was denied a fair trial, only that he might have been denied a fair trial. The Civil Rights Act provides a remedy for actual dep-

rivation of constitutional rights, not possible ones. Thus, the petitioner must plead an actual deprivation of a constitutional right. Petitioner's complaint is only a suggestion to the Court of what might have happened had the relevant information not been disclosed and presented at his criminal trial. Consequently, this lawsuit is predicated on mere speculation as to what might have occurred, not what actually occurred.

The petition is replete with suggestions that allegations of malice or intentional conduct overcome the above set forth deficiencies. Malice is irrelevant. *Littleton* v. *Berbling,* 468 F. 2d 389, 409 (7th Cir. 1972); rev'd on other grounds; *O'Shea* v. *Littleton,* 414 U.S.——, 94 S. Ct. 69 (1974). Thus, negligent suppression of favorable evidence is also violative of *Brady.* (373 U.S. at p. 87). Obviously, if an alleged *Brady* violation is actionable *per se* under the Civil Rights Act absent allegations that the trial was fundamentally unfair, then so is every negligent procedural error of a prosecutor. Needless to say, present and future prosecutors would look elsewhere for employment rather than face damage actions for mere non-prejudicial errors in judgment.

Finally, the petitioner asserts that the case of *Hilliard* v. *Williams,* 465 F. 2d 1212 (6th Cir. 1972), *cert. denied,* 409 U.S. 1059 (1972) establishes that a Section 1983 action is appropriate herein. The respondents respectfully submit that that case is inapposite to the instant matter. In *Hilliard,* the evidence withheld was *exculpatory* and the criminal defendant *was* convicted as a result of the nondisclosure. In the instant case, the evidence was merely probative rather than exculpatory. Additionally, the evidence was presented at the trial and the petitioner was acquitted.

Based upon the foregoing, the respondents respectfully submit that the petitioner has not alleged a violation of his constitutional rights that is actionable under the Civil Rights Act.

II.

PROSECUTING ATTORNEYS ARE IMMUNE FROM CIVIL DAMAGE ACTIONS ARISING OUT OF THEIR OFFICIAL DUTIES.

While the Seventh Circuit did not predicate its ruling on the doctrine of prosecutorial immunity, it could have based its decision on that principle. The law is clear that prosecuting attorneys are immune from civil damage actions arising from the performance of their official duties. *Hampton* v. *City of Chicago,* 484 F. 2d 602 (7th Cir. 1973), cert. denied, 94 S. Ct. 1413 (1974); *Littleton* v. *Berbling,* 468 F. 2d 389 (7th Cir. 1972), rev'd on other grounds, *O'Shea* v. *Littleton,* 94 S. Ct. 669 (1974); *Cawley* v. *Warren,* 216 F. 2d 74 (7th Cir. 1954); *Jennings* v. *Nestor,* 217 F. 2d 153 (7th Cir. 1955); *Madison* v. *Gerstein,* 440 F. 2d 338 (5th Cir. 1971); *Wilhelm* v. *Turner,* 431 F. 2d 177 (8th Cir. 1970), cert. denied, 401 U.S. 947 (1971); *Peek* v. *Mitchell,* 419 F. 2d 575 (6th Cir. 1970); *Bauers* v. *Heisel,* 361 F. 2d 581 (3rd Cir. 1966), cert. denied, 386 U.S. 1021 (1967); *Robichaud* v. *Ronan,* 351 F. 2d 533 (9th Cir. (1965).

In this case, petitioner alleges that the defendant prosecutors failed to respond to a criminal discovery motion in a proper and a timely manner. Responding to such a motion is an integral part of a prosecutor's quasi-judicial function of proceeding with a criminal case. Just like a prosecutor presenting evidence to a grand jury, picking a

jury, trying a case, etc., the duty of responding to a criminal discovery motion is part of his official function.

The appropriate yardstick for determining whether a prosecutor is entitled to immunity is whether he acted clearly outside his jurisdiction, not whether he exceeded his jurisdiction. *Sykes* v. *State of California Department of Motor Vehicles,* 497 F. 2d 197 (9th Cir. 1974). Like judges,[1] prosecutors require the insulation of absolute immunity so as to assure the courageous exercise of their discretionary duties. *McCray* v. *Maryland,* 456 F. 2d 1 (4th Cir. 1972). See also: *Pierson* v. *Ray,* 386 U.S. 547, 553, 555 (1967).

In *Marlowe* v. *Coakley,* 404 F. 2d 70 (9th Cir. 1968), it was alleged that the prosecutor knowingly and willfully presented perjured testimony to a grand jury and deliberately withheld exculpatory evidence from the grand jury. Mr. Marlowe was indicted and subsequently acquitted at his criminal trial. Following his acquittal he instituted a civil rights action against the prosecutor. The Ninth Circuit affirmed dismissal of the civil rights complaint on the ground that the prosecutor was acting within his quasi-judicial authority and was thus entitled to immunity.

In *Guerrero* v. *Barlow,* 494 F. 2d 1190 (5th Cir. 1974), it was alleged that the prosecution denied the civil rights plaintiff access to supplementary police reports, and he consequently was imprisoned and unable to properly prepare for trial. The Court held that the acts complained of

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1. The doctrine of prosecutorial immunity is derived from judicial immunity, which was first announced by this Court in *Bradley* v. *Fisher,* 13 Wall 335, 80 U.S. 335 (1871).

were not clearly outside the scope of a prosecutor's official function.[2]

Finally, the respondents would again point out that allegations of malice or bad faith are irrelevant when considering the parameters of prosecutorial immunity:

> "Cases from this Circuit have uniformly held that an action for damages would not lie against a prosecutor who was performing his duties, no matter what malice was alleged." *Littleton* v. *Berbling*, 468 F. 2d 389, 409 (7th Cir., 1972).

The acts of the prosecutorial respondents which allegedly harmed the petitioner occurred during prosecutorial activities which can only be characterized as an integral part of their quasi-judicial function. Thus, even if the petitioner alleged a violation of his rights rising to the level of Constitutional proportions, these respondents are immune from liability.

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2. See *Imbler* v. *Pachtman*, 500 F. 2d 1301 (9th Cir., 1974); Sup. Ct. docket No. 74-5435, for the most recent Ninth Circuit decision on immunity.

CONCLUSION

Based upon the foregoing respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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